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4 JANE DOE,

5 Plaintiff, Case No. 08-cv-12719
-v-

CIN-LAN, INC., et al.,

Defendants.

9 MOTION HEARING

APPEARANCES:

FOR THE PLAINTIFF: **MR. JASON THOMPSON**
Sommers Schwartz

16 MR. HART L. ROBINOVITCH
17 MR. TIMOTHY J. BECKER
18 Zimmerman Reed

18 FOR THE DEFENDANT: **MS. EDITH THOMAS**
(Harry V. Mohney) Attorney at Law

20 (Deja Vu Consulting) **MR. PAUL W. COUGHENOUR**
Clark Hill

Also Present: Mr. Nicholas Nelson, Law Clerk

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TABLE OF CONTENTS

2

3	IDENTIFICATION	PAGE
4	Argument by Ms. Thomas.....	6
5	Argument by Mr. Coughenour.....	11
5	Argument by Mr. Thompson.....	13

6

7

8	CERTIFICATE OF COURT REPORTER.....	18
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1 Detroit, Michigan

2 August 13, 2009

3 2:00 p.m.

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6 (Call to Order of the Court)

7 MR. NELSON: The Court calls case number

8 08-cv-12719, Jane Doe versus Cin-Lan, Incorporated.

9 THE COURT: Okay. Good afternoon, everybody.

10 You may be seated.

11 This is a case I'm very familiar with.

12 Mr. Thompson, how are you today?

13 MR. THOMPSON: I'm fine, thank you, Your Honor.

14 How are you?

15 THE COURT: I'm great. Who is here? Ms. Thomas?

16 MS. THOMAS: Good afternoon.

17 THE COURT: And your name is?

18 MR. COUGHENOUR: Paul Coughenour, Your Honor,

19 from Clark Hill.

20 THE COURT: Where is Mr. Piszcztowski?

21 MS. THOMAS: Cin-Lan did not join this motion.

22 THE COURT: He is

23 MS. THOMAS: Yes.

24 THE COURT: Okay. The issue, which I met with
25 Mr. Biszczatowski and Mr. Thompson about informally some

1 time ago, deals with the status of Deja Vu Consulting,
2 Incorporated and Harry V. Mohney as employers of plaintiff
3 Jane Doe. We thought it was a prudent strategy after that
4 brief status conference, which I greatly appreciated by the
5 way, to provide for discovery on the business relationships
6 of Deja Vu Consulting, Incorporated and Harry Mohney
7 vis-a-vis Cin-Lan, the nightclub in Lansing or East
8 Lansing, where Ms. Doe was or is employed, and to determine
9 whether or not those business relationships would justify
10 finding them to be employers of Ms. Doe.

11 The theory being why not determine the employment
12 or employer status of those individuals and entities before
13 we go to class certification and determine who is going to
14 be a defendant and who is not. So I thought that was a
15 good way to go at things.

16 Having had that opportunity and now some time has
17 passed, apparently discovery has been conducted and Deja Vu
18 and Mohney have filed a motion -- or separate motions I
19 should say -- for summary judgment claiming that they are
20 not employers within the meaning of the Federal Fair Labor
21 Standards Act, 29 USC section 201, et cetera, as well as
22 Michigan's Minimum Wage Law from 1964.

23 My standard of review here on a Rule 56 motion,
24 as I see it, is we need to determine the facts from
25 discovery as to whether or not Deja Vu Consulting,

1 Incorporated and Harry V. Mohney will be considered to be
2 employers, and then I decide as a matter of law whether or
3 not they are, and that's my simple job. Simple job is made
4 complex by what I have in front of me and I think what is
5 blown up in front of me is a rather large corporate
6 structure that leads to the employment of Jane Doe.

7 I would just note a couple of things for the
8 record. I don't find this to be a complex issue. I think
9 Mr. Mohney and the corporate entities, as well as Krontz,
10 St. John, and the people that are employed by them, are
11 engaged in a rather significant shell game here, possibly
12 aimed at avoiding liability in cases like this, who knows?
13 *Reich versus Circle C Investments, Incorporated*, a Fifth
14 Circuit Case from 1993, makes plain that an individual who
15 does not have an ownership interest in strip-club
16 operations, does not control the day-to-day operations of
17 those companies but only manages to be a consultant, even
18 in the face of exclusion of personnel matters from
19 responsibilities, does not mean that the individual does
20 not exercise control or does not suffer liability in a FLSA
21 situation.

22 This is a Rule 56 motion so we have to look at
23 everything that is said in the light most favorable to the
24 nonmoving party, Jane Doe, and I just don't see how setting
25 up, you know, Cin-Lan Incorporated, which is owned by

1 Imagination Incorporated, which is owned by the Harry
2 Mohney Trust, which is the sole -- Harry Mohney being the
3 sole trustee and beneficiary, gets Mr. Mohney out of
4 liability under the FLSA, under, you know, potential tax
5 issues, or for whatever reason he may have set these
6 companies up.

7 I would also say, we are here looking at Rule 56
8 matters and I don't see how the plaintiff can be taxed with
9 properly opposing this when Mohney has not turned over
10 e-mail documents. When there is lack of correspondence
11 between the trustees, lack of correspondence -- one of the
12 most outrageous things I read is that Mohney says under
13 oath in a deposition that he cannot locate most of the
14 memos he sent to various Deja Vu nightclubs because his
15 16-year-old son had destroyed his computer.

16 All right. This is ridiculous. If you want to
17 take time and argue you go ahead, but I can tell you pretty
18 much how I'm going to decide this. Okay? Anything?

19 MS. THOMAS: I would prefer to argue.

20 THE COURT: Go ahead. You can try to change my
21 mind, but I think this is completely ridiculous.

22 MS. THOMAS: Well, I think the first thing, Your
23 Honor, is that what the plaintiffs want to do by showing
24 this corporate structure is convince the Court that an
25 enterprise is enough and is the same as a joint employer.

1 And what the testimony has been, which the plaintiffs
2 simply don't believe, is that Mr. Mohney doesn't engage in
3 matters that each of these cases set forth, which is
4 actually being involved in hiring and firing, setting the
5 standards of employment, looking at time records, setting
6 compensation, looking at schedules, those kind of things.
7 And if you go through each of the cases, which I did one by
8 one, each of those cases has the kind of conduct, active
9 conduct, of an officer or owner engaging in
10 employment-related matters.

11 Now, they have shown the Court various facts
12 showing that Mr. Mohney looks at sales reports. He has
13 written articles about how to read sales reports. They
14 have no evidence whatsoever that he was involved in hiring
15 and firing and in terms of the case that you noted, which I
16 believe is *Circle C*, that person who was a consultant for a
17 nightclub like this, close reading of the case shows that
18 he actually hired waitresses, he was on the premises, he
19 engaged the staff concerning hours of operation and the
20 hours of workers.

21 He was present there, which Mohney has not been
22 placed as being present, and although I understand that the
23 Court is viewing this as sort of a whole nefarious scam
24 of -- I can't remember the word that you used, but
25 shuffling around corporations.

1 THE COURT: I called it a shell game.

2 MS. THOMAS: A shell game.

3 THE COURT: Yeah, I called it an effort to avoid
4 liability by setting up a bunch of corporations that
5 separate the individual from those types of acts that you
6 are citing from the cases, and I think that that is going
7 to have to be explored by the plaintiffs further at the
8 minimum, and I also find that, how in the world do I know
9 whether or not he did the sorts of things that you say
10 *Circle C* requires him to do to rise to the level of
11 liability without even having looked at e-mail
12 correspondence because his son, who is 16, destroyed his
13 computer, because there is no correspondence turned over
14 between the trustees, because you raise eight or nine
15 objections to each interrogatory that Ms. Doe files. I
16 just do not see that we are going to let Mr. Mohney and
17 Deja Vu Consulting, Incorporated out at this juncture in
18 the blind of night with this sort of structure that has
19 been, in my view, put in place to avoid the type of
20 liability which Ms. Doe wants to attach to him. It's that
21 simple.

22 MS. THOMAS: And just to speak quickly as to the
23 discovery issue, the plaintiffs had five months to do
24 discovery. They have never done a motion to compel. We
25 have repeatedly offered to meet and confer with them. We

1 have offered them to pick up the expense of looking through
2 computers for e-mails, and they have never responded to any
3 of those things, nor have they ever done a motion to
4 compel.

5 So, for the plaintiffs to come in response to the
6 motion for summary judgment and say, well, we didn't get
7 information, they have had five months to get that
8 information.

9 THE COURT: Okay. That's fair. That's fair.
10 And if you two get together and you come up with
11 information and you put together a complete record, and it
12 looks like I'm wrong and you are right and Mr. Mohney had
13 nothing to do with this outfit, then there is nothing
14 further the plaintiffs can do to show that he did, I would
15 entertain a renewed motion and dismiss the case as to
16 Mr. Mohney.

17 But based on what I have seen here, my conclusion
18 is the opposite, that nothing but one level of complexity
19 after another has been added to the corporate structure to
20 separate the -- I mean, my understanding is there is a guy
21 in the deposition testimony who was asked, you know, what
22 is his value as a consultant, 2500 -- \$25,000 a year? No,
23 he is worth a million dollars a year.

24 You know, I mean, it seems to me like this
25 individual controls the purse strings and the knowledge of

1 what goes on out there. If that's not true, fine, then we
2 can look at that, but from what I've seen here, I'm not
3 able to say it's not.

4 MS. THOMAS: Right. And I understand that those
5 things may be true. But I don't think they go to the joint
6 employer issue. And the other comment I want to make is,
7 when you say that this shell game is used to avoid
8 liability, Cin-Lan has conceded that it is subject to FLSA
9 jurisdiction. It has a sufficient number of employees, it
10 has sufficient income. So no one is evading liability.

11 What these cases have to do with is, particularly
12 the enterprise theory, is coverage, and the plaintiffs who
13 worked at Cin-Lan are definitely covered by the FLSA and
14 there is no question about that. So that would not be a
15 fair assessment that they are using this to avoid
16 liability.

17 THE COURT: Okay. All right. Very good. Thank
18 you. Anything else? Thank you very much.

19 Mr. Coughenour? Is that --

20 MR. COUGHENOUR: Yes, it is, Your Honor. I have
21 something very brief to add.

22 THE COURT: Good.

23 MR. COUGHENOUR: Good on the brief part, I
24 assume?

25 THE COURT: Right.

1 MR. COUGHENOUR: Your Honor, simply this, let's
2 assume for a minute that that chart is accurate, and even
3 what you have said is accurate, which it may well be that
4 this corporate structure was designed for some purpose,
5 what we would then have is basically what a parent
6 corporation has over its subsidiaries. Fine. They are all
7 related or perhaps part of the same enterprise, if what you
8 are saying is correct, or what the plaintiffs are saying is
9 correct, but that still -- there is still a distinction to
10 be made between that issue and liability and to me, Your
11 Honor, I think the Court -- I would like the Court to focus
12 on that part of the FLSA that requires a showing of how in
13 this case, Consulting, because that's the client I'm
14 representing, acted in the interest of the employer, which
15 would be Cin-Lan, in relation to the employee, which is
16 argued to be the plaintiff.

17 And that's all. I -- I have looked at the
18 record. I have come into this somewhat late. I have read
19 the deps and all the documents. I don't see where there is
20 anything in the record that Consulting did in the interest
21 of Cin-Lan in relation to Jane Doe, and that's the
22 statutory requirement and no matter how interconnected or
23 spaghetti-like these corporate structures are, if
24 Consulting did not take actions in respect or in relation
25 to Jane Doe, it's not a joint employer under the FLSA.

1 And the only other thing I would add on Michigan
2 Wage Law, Your Honor, it's interesting to me, there is a
3 distinction here between, you know, the statutory
4 definition and the FLSA and the Minimum Wage Law and the
5 Minimum Wage Law includes or incorporates a requirement
6 that the employer designate the work site or have the
7 employee work at a fixed work site.

8 So my argument to this Court is simply that there
9 is no showing Consulting did that with respect to Jane Doe,
10 therefore, under the Michigan Minimum Wage Act, it cannot
11 be her employer.

12 THE COURT: All right. Thank you very much.

13 MR. COUGHENOUR: I'm sorry. I should --

14 THE COURT: No, no, that's fine. I just have a
15 brief comment, which you can sit right down, that's fine.

16 I guess I see Deja Vu Consulting, Incorporated
17 closer to the case than Mohney is. I think that Sime
18 oversaw Cin-Lan's day-to-day operations, that he had
19 authority how the club would function and treat the
20 employees and that this fellow Krontz, that I mentioned
21 before, who was president of Cin-Lan and was virtually
22 indistinguishable from his employment as a consultant with
23 Deja Vu and, obviously, she would be an employee of Cin-Lan
24 and Deja Vu could be considered as an employer of all of
25 Cin-Lan's employees, but I will keep an open mind and I

1 will look closely at the issue brought to bear, which is
2 whether or not Deja Vu has a requisite connection under the
3 FLSA with Ms. Doe.

4 MR. COUGHENOUR: Thank you, Your Honor.

5 THE COURT: Now, let me say this to Ms. Thomas
6 and Mr. Coughenour -- it's not a personal issue -- I read
7 your briefing and your briefing was excellent and
8 comprehensive and clear. I just think you represent
9 clients who, you know, found themselves, at least with me,
10 in a -- in a tough spot. I think we need to -- we need to
11 go further with some factual developments, see what
12 develops and see where they go.

13 If I, indeed, deny your motion, I will issue an
14 order and I will make it plain that you are free to renew
15 it when more of the facts that I'm concerned about would
16 come up.

17 So you can say something if you want,
18 Mr. Thompson. I doubt that you need to but it's entirely
19 up to you.

20 You are going to do it anyway, aren't you?

21 MR. THOMPSON: I'm only going to make two points.
22 One is to tell you last week I was over in the Western
23 District arguing a motion for a protective order and the
24 defense counsel and Magistrate Judge Scoville were having a
25 heated exchange and I stood up at the table and got geared

1 up and ready to respond to all of the arguments and
2 Magistrate Judge Scoville looked at me and said, is there a
3 reason you are standing up? So I will take that cue and
4 not address much of anything here today because I think
5 Your Honor has a good grasp of things.

6 I would ask, though, that we address what we do
7 next. As you indicated when you first took the bench, the
8 whole purpose of the last six month has its genesis in
9 defendants' objections to many of our discovery requests on
10 the grounds that this was never going to extend beyond the
11 Cin-Lan Club in Lansing and it certainly shouldn't involve
12 any class issues. I'm just not quite sure at this point
13 what Your Honor would like us to do. Should we have
14 another meet-and-confer after we get your order and decide
15 what we should do next in terms of discovery?

16 THE COURT: I think the number one thing to do is
17 to let me revisit everything that I have read and consulted
18 with my staff about, especially my law clerk, Mr. Nelson
19 here, and make sure I issue an order that resolves a
20 summary judgment motion.

21 After that, it seems to me you will have a case
22 with anywhere from one to three defendants, a plaintiff
23 with a putative class action, and if I'm not mistaken, our
24 goal -- or at least our idea was to then take off in the
25 direction of discovery on the class issues. So I assume

1 that's where we go next. But let me look at the file and
2 go a little further in terms of resolving this motion. And
3 if we need to have a status conference to decide a
4 discovery plan or any other dates, we will go with that. I
5 didn't look at the scheduling order before I came out here,
6 just so you know. So that would be my answer to your
7 question.

8 Anything else you want to say?

9 MR. THOMPSON: Thank you.

10 THE COURT: Thank you very much.

11 Let me just say this: We are flying very quickly
12 around here right now for a number of different reasons,
13 including the fact that my friend Mr. Nelson is, you know,
14 with my pride and joy, going up to the Third Circuit next
15 year. We issued an order earlier this week. I think we
16 probably struck some matters without reading the record as
17 carefully as we could have, and we cleaned that up as
18 quickly as possible. But I am not shy to say to you that
19 was a mistake. I apologize for doing that. But we got the
20 right order issued I think an hour later, so I did want to
21 say that.

22 Other than that, I think we are -- we all know
23 where we are at. I will issue an order within the next 15
24 days. And we will go from there. Okay?

25 MR. COUGHENOUR: Your Honor, may I address just

1 one more thing?

2 THE COURT: Yes.

3 MR. COUGHENOUR: The subject of mistakes, I'm
4 sorry I should have done this earlier. I gave a copy -- as
5 I read the deposition of Jim St. John, it's struck me that
6 some of the testimony was improperly reported. We
7 contacted the court reporter. She indeed said this is the
8 case. I quoted an answer of Mr. St. John when it was
9 Robinovitch's question. She sent today the corrected copy
10 of the transcript page.

11 May I submit that?

12 THE COURT: Absolutely.

13 MR. COUGHENOUR: For the record, quoted on pages
14 8 and 9 of the plaintiff's brief, obviously, they weren't
15 aware of the misreporting.

16 THE COURT: Absolutely. It's too bad Karen
17 Klerekoper is not in private practice anymore. She
18 wouldn't have made that mistake.

19 THE COURT: We are in --

20 MR. THOMPSON: Before we --

21 THE COURT: Go ahead.

22 MR. THOMPSON: In light of that correction that
23 was just brought to our attention, I would like to cite to
24 the Court, Plaintiff's Exhibit 3, which is the deposition
25 of Donald Krontz on page 104, for the simple fact that the

1 whole sum and substance of the misquoted deposition
2 testimony is again repeated on page 104. Any value that we
3 had associated with the misquote is entirely consistent
4 with page 104, Mr. Krantz's deposition. I just want to
5 note that.

6 THE COURT: Good. So we are all on the same
7 page, at least you guys are.

8 All right. Have a good weekend. Thank you, and
9 we are in recess.

10 MR. NELSON: All rise. Court is adjourned.

11

12 (Proceedings adjourned at 2:24 p.m.)

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3 **CERTIFICATE OF REPORTER**

4 As an official court reporter for the United
5 States District Court, appointed pursuant to provisions
6 of Title 28, United States Code, Section 753, I do hereby
7 certify that the foregoing is a correct transcript of
8 the proceedings in the above-entitled cause on the date
9 hereinbefore set forth.

10

11

12

s/ Karen M. Klerekoper

13

KAREN M. KLEREKOPER, CSR, RPR

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Official Court Reporter

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